United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7187

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JEAN D'AGOSTA,

Plaintiff-Appellee,

—v.—

W. T. GRANT COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANT

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No. 75-7187

JEAN D'AGOSTA,

Plaintiff-Appellee,

VS.

W. T. GRANT COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT, NEWMAN, J.,
APPROVING ORDER OF LATIMER, M.

BRIEF OF DEFENDANT-APPELLANT

Statement of Issues

Did the District Court err in holding that there was Federal subject matter jurisdiction, under 15 U.S.C. §1640 (e), over claims arising under the Connecticut Truth-in-Lending Act, C.G.S. §§36-393 *et seq.*?

Did the District Court err in holding that certain disclosure statements given to plaintiff failed to comply with the provisions of the Connecticut Truth-in-Lending Act, C.G.S. §36-393 *et seq.*, and the Connecticut regulations promulgated thereunder, Conn. Regs. §§36-395-1, *et seq.*?

Statement of the Case

This is an appeal from a partial summary judgment entered against defendant-appellant upon a finding by Latimer, M., "so ordered" by Newman, J., that defendant had violated the Connecticut Truth-in-Lending Act, C.G.S. §36-393, *et seq.* A copy of the opinion and partial summary judgment below are reproduced in the Appendix at pp. 19a and 21a, respectively.

Plaintiff entered into two relevant retail instalment sales contracts with defendant for the purchase of so-called "big ticket" items[1]—a contract on December 1, 1972 for a Gas Range and a contract on December 13, 1972 for the purchase of a five piece "Danbury set". Copies of the contracts are attached to plaintiff's affidavit. (App. pp. 17a, 18a). Both contracts were of the "add-on" type, i.e. contracts which are executed by a customer who already has an outstanding balance for credit purchases prior to his or her entry into a new contract. Plaintiff failed to pay her obligation on those contracts and defendant has filed a counterclaim in this action for the $1,407.57 balance due thereon, interest and attorneys' fees. (Answer, App. p. 8a).

Plaintiff's complaint alleges violation of the Connecticut Truth-in-Lending Act, C.G.S. §36-393, *et seq.* (Compl., Count I, App. p. 5a) and the Connecticut Retail Instal-

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[1] The type of contract involved distinguishes this case from *Ives* v. *W.T. Grant, Co.*, —— F. Supp. —— (D. Conn. 1974), CCH Consumer Credit Guide ¶98,847, *appeal pending* (2nd Cir.) (Dkt. No. 74-2131), which involved defendant's "coupon plan", under which customers purchased merchandise coupons, rather than purchasing merchandise directly. That distinction is most relevant as regards the "security interest" violation found by the Court below. See pp. 31, 32, *infra*.

ment Sales Financing Act, C.G.S. §42-83 *et seq.* (Compl., Count II, App. pp. 5a, 6a) and further alleges that, under Connecticut common law, the contracts at issue are unconscionable (Compl., Count III, App. p. 6a). The sole basis upon which plaintiff purports to rest federal jurisdiction over these state law violations is 15 U.S.C. §1640(e), the jurisdictional provision of the *Federal* Truth-in-Lending Act, 15 U.S.C. §§1601, *et seq.;* there is no allegation of diversity of citizenship nor of any ground of federal jurisdiction. (Compl., ¶2, App. p. 4a).

Plaintiff moved for partial summary judgment as to the Truth-in-Lending allegations only. (Motion for Partial Summary Judgment, App. p. 14a). This motion was granted and partial summary judgment was entered for plaintiff in the amount of $776.98 on the December 1, 1972 contract and $872.00 on the December 13, 1972 contract, plus attorneys' fees in an as yet undetermined amount. (Partial Summary Judgment, App. p. 21a).

Defendant has appealed therefrom (Notice of Appeal, App. p. 22a), maintaining (1) that the District Court lacks jurisdiction over the subject matter of this action, pp. 4-14 *infra,* and (2) that, even if it had jurisdiction, the District Court erred in granting partial summary judgment on the truth-in-lending questions, pp. 14-33, *infra.*

ARGUMENT

I.

The Federal District Court Has No Jurisdiction over Claims Arising under the Truth-in-Lending Law of the State of Connecticut.

A. *15 U.S.C. §1640 Does Not Create Federal Subject Matter Jurisdiction Over Claims Arising Under the Law of the State of Connecticut*

This is an action alleging *inter alia,* violation of the requirements of the Connecticut Truth-in-Lending Act, C.G.S. §§36-393 *et seq.* (Compl. ¶1, App. p. 4a). Jurisdiction is predicated on 15 U.S.C. §1640 (Compl. ¶2, App. p. 4a), which provides,[2] in relevant part:

> (a) Except as otherwise provided in this section, any creditor who fails to comply with any *requirement imposed under this chapter* or chapter 4 of this title with respect to any person is liable to such person. . . .
>
> * * * * *
>
> (e) Any action under *this section* may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. (emphasis added)

Thus, the federal subject matter jurisdiction created by §1640 extends only to actions against a "creditor who fails to comply with *any requirement imposed under this chapter* [emphasis added]," i.e. Chapter 2 of the Federal Act.

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[2] As amended by Pub. L. 93-495, 1974 U. S. Code Congressional and Administrative News 1724 *et seq.*

However, with three exceptions not relevant in this case, all classes of credit transactions in Connecticut have been exempted from the "requirements" of Chapter 2 of the Federal Act.[3] The operative regulation provides in its entirety:

> *Connecticut*: Except as provided in §226.12(c), all classes of credit transactions within the State of Connecticut are hereby granted an exemption from the *requirements of Chapter 2 of the Truth in Lending Act* effective August 1, 1970, with the following exceptions:
>
> (1) Transactions in which a Federally chartered institution is a creditor;
>
> (2) Consumer credit sales of insurance by an insurer;
>
> (3) Transactions under common carrier tariffs in which the charges for the services involved, the charge for delayed payment and any discount allowed for early payment are regulated by a subdivision or agency of the United States or the State of Connecticut. (emphasis added) 35 Fed. Reg. 11992.

Accordingly, as of August 1, 1970, all classes of credit transactions in Connecticut were exempt from "the requirements of Chapter 2."

Therefore, the District Court did not have subject matter jurisdiction pursuant to §1640(e) over the state truth-in-lending claims in this case.[4]

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[3] Chapter 2 of the Federal Act, Pub. Laws 90-321 and 90-508, consists of §§121-134 ("credit transactions"), which have been codified as 15 U.S.C. §§1631-1644. Sections 132-134 (1642-1644) were added by Pub. L. 90-508, deal with credit cards, and are not relevant to this matter.

[4] Although defendant has not yet moved in the District Court to dismiss for lack of subject matter jurisdiction, the matter may

B. ***The Federal Reserve Board Has No Power Under 15 U.S.C. §1633 to Grant a Partial Exemption***

Section 1633 provides:

> The Board shall by regulation exempt from the requirements of this chapter any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this chapter, and that there is adequate provision for enforcement.

Since the word "exemption" is not modified or qualified in §1633, the Federal Reserve Board ("F.R.B.") is required to exempt a class of credit transactions within a state from all, not some, of the requirements of Chapter 2, once the F.R.B. determines that, under the law of that state, the class of credit transactions is subject to requirements substantially similar to those imposed under Chapter 2 of the Federal Act and that there is adequate provision for enforcement. On July 20, 1970, the F.R.B. granted Connecticut an exemption from the Federal Truth-in-Lending Act, 35 Fed. Reg. 11992. The plaintiff has made no claim that the Connecticut law does not contain requirements substantially similar to those imposed under Chapter 2 of the Federal Act nor that there is not adequate provision for enforcement. Therefore, §1640, which is part of Chapter 2, does not provide a basis for federal subject matter jurisdiction over the state law claims made by the plaintiff in this case.

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be raised for the first time on appeal, Fed. R. Civ. P. 12(h); 1 Moore, Federal Practice ¶0.60[4] (2d Ed. 1974), and this Court may remand to the District Court with instructions to dismiss, *Thompson* v. *New York Central Railroad Co.*, 361 F.2d 137, 144-45 (2d Cir. 1966).

The only possible argument that plaintiff could make that §1633 empowers the F.R.B. to issue a "partial" exemption would be that the clause "requirements of this chapter" does not include the requirements of §1640. Such an argument is not persuasive.

First, the legislative history of the Truth-in-Lending Act reveals that one of the major objections to the bill was the fear of expanding federal control. Only because of the pre-emptive features of §6b [§1633] did Senators such as Wallace F. Bennett support the Act. See his statements at 113 Cong. Rec. 18409 (July 11, 1967). Senator McIntyre also indicated that the pre-emption features were among the few parts of the bill that appealed to him. 113 Cong. Rec. 18413 (July 11, 1967). In fact, defendant is not aware of any statement in the legislative history suggesting that concurrent jurisdiction of federal and state courts was contemplated by the exemption provisions. There is, however, significant support for the proposition that the legislative history decisively establishes that pre-emption was the goal behind §1633. *See* Hearings on S.5 Before the Subcommittee on Financial Institutions of the Committee on Banking and Currency, 90th Cong., 1st Sess. (1967) at 281 (remarks of Senator Proxmire, the driving force behind the Senate bill), 451-52 (memorandum submitted by the General Counsel of the Treasury predicting that the pre-emption features of the bill would assure a diminishing federal and an expanding state role as the F.R.B. issued exemptions), 666, 677, and 681 (testimony of J. L. Robertson, Vice Chairman of the Board of Governors of the Federal Reserve System: "[a]s I understand this whole proposal, one of the purposes is to encourage States to do this sort of jobs themselves" at 677); S. Rep. No. 392, 90th Cong., 1st Sess.

(1967) at 8-9, 21. Indeed, after acceptance of the final bill, Senator Sparkman emphasized on the Senate floor that "[s]hould the States enact legislation substantially similar to the Federal bill, they can become exempt from the Federal law." 114 Cong. Rec. 11492 (May 22, 1968).

Secondly, the word "requirements" is used twice in §1633 and, from the context, it is clear that when used the second time it was intended to have a narrower meaning than when first used. When used the second time, it clearly means the *disclosure requirements* of state law which are applicable to the *exempted* class of transactions. When used the first time, it means all the requirements of chapter 2 of the Federal Act which are applicable to *non-exempted* transactions. The "requirements of this chapter" include requirements other than disclosure requirements, including the requirement contained in §1640 that a creditor respond in damages if he fails to disclose the information required to be disclosed.

Chapter 2 also includes §1634 which provides:

> If information disclosed in accordance with this chapter is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this chapter.

Section 1634, like §1640, does not contain any *disclosure* requirements. However, the F.R.B. included §1634 among the sections from which Connecticut was exempted.

Therefore, any distinction which plaintiff might seek to draw between "requirement" and "remedy" just does not exist. The word "remedy" does not appear in Chapter 2 of the Federal Act or in the applicable F.R.B. Regulation.

Section 1640 is entitled "Civil liability" and the F.R.B. used this terminology in 12 C.F.R. §226.12(c) when it attempted to create federal jurisdiction over state law claims:

> In order to assure that the concurrent jurisdiction of Federal and state courts created in section 130(e) of the Act shall continue to have substantive provisions to which such jurisdiction shall apply, and generally to aid in implementing the Act with respect to any class of transactions exempted pursuant to paragraph (a) of this section and Supplement II, the Board pursuant to sections 105 and 123 hereby prescribes that:
>
> (1) No such exemption shall be deemed to extend to the civil liability provisions of sections 130 and 131; and
>
> (2) After an exemption has been granted, the disclosure requirements of the applicable State law shall constitute the disclosure requirements of this Act, except to the extent that such State law imposes disclosure requirements not imposed by this Act. Information required under such State law with the exception of those provisions which impose disclosure requirements not imposed by this Act shall, accordingly, constitute the "information required under this Chapter" (Chapter 2 of the Act) for the purpose of section 130(a).

Obviously, when the F.R.B. promulgated 12 C.F.R. §226.12(c), it construed the phrase "requirements of this chapter" as used in §1633 to include the civil liability provisions of §1640. Otherwise, the convoluted and laborious structure of §226.12(c) would not have been necessary.[5]

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[5] It should be noted that §226.12(c) does not even by its terms purport to preserve concurrent jurisdiction over truth-in-lending claims. That section provides for the incorporation of state dis-

The F.R.B. merely would have stated in the regulation that the exemption shall not extend to §1640.

The Congressional plan was that (1) the F.R.B. was to issue exemptions to states, (2) the states thereupon would take over truth-in-lending responsibilities, and (3) federal law thereby would be pre-empted. This plan was clearly expressed in §§1633 and 1640 which provide, respectively, for F.R.B. exemption of states from the requirements of federal law and federal court subject matter jurisdiction only over violations of the requirements of federal law. But the F.R.B. took it upon itself to frustrate this plan and issued a regulation stating that "the disclosure requirements of the applicable State law shall constitute the disclosure requirements of this Act. . . ." In other words, an administrative agency presumed by regulation to adopt state law as the law of the United States in order to provide federal subject matter jurisdiction over violations of the state law.

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closure requirements as federal requirements "except to the extent that such State law imposes disclosure requirements not imposed by this Act". Thus, even the F.R.B. recognizes that § 1640 does not provide for federal jurisdiction over additional disclosure requirements imposed by a State. Connecticut, for example, requires disclosure of the "address and telephone number where inquiries may be directed". Connecticut General Statutes § 36-404(b)(11), § 36-405(a)(11), and § 36-406(a)(9). The federal act does not contain such a requirement. Not only does § 226.12(c) fail to preserve concurrent jurisdiction, it also creates a risk of double exposure to a creditor on a single disclosure form. That section permits a federal action for violation of state disclosure requirements incorporated into federal law, but not for those not so incorporated. Thus, a debtor could sue in the federal court for failure to comply with the incorporated disclosure requirements and at the same time sue in the state court for failure to comply with the non-incorporated disclosure requirements. Congress did not intend this result.

If Congress had intended to adopt state law by reference, it would have expressed such intention in clear and unambiguous language. Although the incorporation (or absorption) of federal law into state law is commonplace, *see, e.g., Note, Supreme Court Review of State Interpretations of Federal Law Incorporated by Reference,* 66 HARV. L. REV. 1498 (1953), Congress has rarely incorporated state law by reference into federal law, except in special situations, such as the Federal Tort Claims Act, where state law is applied, see 28 U.S.C. §1346(b), and in tax and criminal statutes where state law is often used to obtain definitions. *e.g.,* 18 U.S.C. §§ 13, 1153. *See,* Hart & Wechsler, *The Federal Courts and the Federal System* 491-94, 768 (2d Ed. 1973); Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 529-30 (1954).

Research discloses only one statute where Congress has broadly adopted state law by reference, thereby "absorbing" it into and making it federal law. Section 4 of the Lands Act, 43 U.S.C. § 1333, provides in relevant part:

> (a)(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, *the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States* for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . . All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. . . .

> (3) The provisions of this section for *adoption of State law as the law of the United States* shall never be interpreted as a basis for claiming any interest . . . on behalf of any state for any purpose over the seabed and subsoil of the outer Continental Shelf . . . (Emphasis added)

Thus, Congress expressed its desire to adopt state law as federal law in language which is clear and explicit. The Senate Report referred to the "precise unequivocal language" of "the provision for the adoption of State laws as Federal law," S. Rep. No. 411, Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., 11 (1953) cited in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352, 357-59 (1969). "The principles that federal law should prevail and that state law should be applied only as federal law and then only when no inconsistent federal law applied, were adopted by a Congress in which full debate had underscored the issue." 395 U.S. at 358. *Also see Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 102-03 (1971).

In light of the fact that federal courts are courts of limited jurisdiction, *see, e.g., Palmore* v. *United States,* 411 U.S. 389, 396 (1973), *Lockerty* v. *Phillips,* 319 U. S. 182, 187-88 (1943), *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 234 (1922), and *Sheldon* v. *Sill,* 49 U.S. [8 How.] 441, 448-49 (1850), if Congress had intended to incorporate the state law into the Federal Act, it would have done so in clear and explicit language as it did in the Lands Act.

Since the FRB had no power to adopt state law as federal law, §226.12(c) is void and of no effect insofar as it purports to do so.

C. *The Exemption Granted Connecticut Is Valid Even If 12 C.F.R. §226.12(c) Is Invalid*

The procedures and criteria under which any state may apply for exemption pursuant to § 1633 are set forth in 12 C.F.R. § 226.12—Supplement II(c)(3) which provides:

> (3) In determining whether provisions for enforcement of State law referred to in subparagraph (1) of paragraph (b) is [sic] adequate, consideration will be given to the extent to which, under the laws of the State, provision is made for:
>
> (i) Administrative enforcement, including necessary facilities, personnel and funding;
>
> (ii) Criminal liability for willful and knowing violation with penalties substantially similar to those prescribed under §112 of the Act;
>
> (iii) Civil liability for failure to make required disclosures substantially similar to those provided under § 130 and § 131 of the Act, except that more severe penalties may be provided; and
>
> (iv) A statute of limitations with respect to civil liability of substantially similar duration as that provided under §130 of the Act.

The plaintiffs do not claim that the Connecticut Truth-in-Lending Act fails to meet any of the criteria established by 12 C.F.R. §226.12—Supplement II(c)(3). Indeed an analysis of the Connecticut Truth-in-Lending Act demonstrates that the F.R.B. was correct in determining that the Act met all the relevant criteria.[6]

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[6] C.G.S. Section 36-414 provides for administrative enforcement by an existing state agency; C.G.S. §36-399, for criminal penalties; and C.G.S. §36-407, for civil liability and a statute of limitations.

The exemption, therefore, must, as was intended by Congress, stand without the offending limitations. Section 501 of the original Act, Pub. L. 90-321, provides in relevant part:

> [i]f a provision enacted by this Act is held invalid in one or more of its applications, the provision remains in effect in all valid applications that are severable from the invalid application or applications.

Here, the offending limitation is mere surplusage, since the Congressional mandate is to issue an exemption whenever the F.R.B. determines, as it did here, pursuant to an otherwise valid and complete regulation, that the state law is "substantially similar" to federal law and there is adequate provision for enforcement.

II.

On the Record below, the District Court Erred in Granting Summary Judgment on Plaintiff's Truth-in-Lending Claims.

Count I of the Complaint alleges violations of the Connecticut Truth-in-Lending Act, C.G.S. §36-393, *et seq.* (the "Act"), and the Regulations promulgated thereunder by the Connecticut Banking Commissioner, Conn. Reg. §§36-395-1, *et seq.* (the "Regulations"). Plaintiff moved for summary judgment as to those allegations and the Court granted that motion. Defendant appeals from that partial summary judgment.

In its opinion, (App. pp. 19a), the District Court did not enumerate the ways in which it believed that the disclosure statement at issue in this matter violated the pro-

visions of the Act and Regulations. Rather, it merely incorporated by reference all the errors which it had earlier, in *Ives* v. *W. T. Grant Co.*, —— F. Supp. —— (D. Conn. 1974), CCH Consumer Credit Guide ¶98,847, *appeal pending* (2nd Cir.) (Dkt. No. 74-2131), found existed in the same disclosure form, as applied to defendant's "Coupon Plan",[7] referring to "defendant's failure on each occasion as a regulated creditor to comply with truth-in-lending requirements *in respects previously discussed in Ives* v. *W. T. Grant Co.*, Civil No. 15,125 (D. Conn. March 19, 1974)". (Emphasis added). (App. p. 19a). Therefore, to determine the alleged violations in this case, it is necessary to look to the District Court's opinion in *Ives*.

In *Ives*, the Court found five alleged violations:

> 1) the failure to employ the term "Unpaid Balance" Conn. Reg. §§36-395-7(c)(5); (12 C.F.R. §226.8(c)(5))[8];
>
> 2) the failure to disclose clearly, conspicuously, and meaningfully the "Finance Charge", Conn. Reg. §36-395-5(a); (12 C.F.R. §226.6(a));
>
> 3) the failure to describe each amount included in the finance charge, Conn. Reg. §36-395-7(c)(8)(A); (12 C.F.R. §226.8(c)(8)(i));

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[7] The printed disclosure statement form involved in *Ives* v. *W.T. Grant Co.*, *supra*, is identical in all relevant respects to the statement in question here. However, as discussed at pp. 29-33, *infra*, the facts of this case differ from *Ives* as regards the method in which the form was completed. *Ives* was argued before this Court on March 11, 1975; as of the date of this brief, no decision has been rendered therein.

[8] For the convenience of the Court, each reference to a section of the Connecticut Act or Regulation is followed by a citation to the "substantially similar" Federal provision.

4) the failure to disclose insurance premiums as an element of the finance charge, Conn. Reg. §§36-395-3(a)(5), 36-395-7(c)(8)(A); (12 C.F.R. §§226.4(a)(5), 226.8(c)(8)(i)); and

5) the failure to disclose the meaning and effect of the security interest clause, Conn. Reg. §36-395-7(b)(5); (12 C.F.R. §226.8(b)(5)).

As set forth below, as to each of these alleged violations, either there exists a genuine issue as to a material fact or plaintiff is not entitled to judgment as a matter of law, based upon her affidavit and the exhibits thereto. (App. pp. 15a). Therefore, summary judgment should have been denied, Fed. R. Civ. P. 56(c). The case should be reversed and remanded for a hearing on the allegations of Count I of the Complaint.

A. *The District Court Erred in Holding That, as Applied to This Plaintiff, the Term "Unpaid Balance" Was a Necessary Disclosure*

The District Court, invoking *Ives,* held that the disclosure statement given to plaintiff failed to comply with the provision of Conn. Reg. §36-395-7(c)(5) (12 C.F.R. §226.8(c)(5)) providing for the disclosure of the "Unpaid Balance." This ruling was erroneous as a matter of law. The "Unpaid Balance of Cash Price", shown on line 3 on the disclosure statement, (Exhibits A & B to Plaintiff's Motion for Partial Summary Judgment, App. pp. 17a, 18a) is the same as the figure which would represent the "Unpaid Balance," if that latter language were to be used and, therefore, use of the term "Unpaid Balance" would be superfluous.

As a threshold matter, it must be recognized that, by its own terms, §36-395-7(c)(5) (12 C.F.R. §226.8(c)(5)) does

not require the use of every one of the eight terms there enumerated in every transaction. That section states in part:

> In the case of a credit sale, in addition to the items required to be disclosed under subsection (b) of this section, the following items, *as applicable,* shall be disclosed:
>
> (Emphasis Added)

To hold, as did the District Court, that a term must be used, even though it conveys only the same information as is given elsewhere, would effectively eliminate the "as applicable" language from the Regulation. Therefore, the District Court for the Northern District of Georgia, in a case completely analogous to this one, held that "Unpaid Balance" need not be used where that figure would be identical to the "Unpaid Balance of Cash Price."

> It will be seen from a careful reading of the above quoted Regulation that the amount to be designated "unpaid balance" is determined by and defined as the addition of the "unpaid balance of cash price" and "all other charges, individually itemized, which are included in the amount financed but which are not a part of the finance charge." Thus, logic dictates that in those circumstances where there are no "other charges" to be added to the "unpaid balance of cash price", the term "unpaid balance" has no meaning. That is to say, the term "unpaid balance" is not applicable, the above quoted Regulation clearly recognizing that every specified term will not in every case be called for, as is evidenced by the use of the phrase "as applicable" in the first paragraph of the Regulation.
>
> *Ivey* v. *Atlanta Gas Light Company,* —— F. Supp. —— (N. D. Ga. 1974) CCH Consumer Credit Guide ¶98,704 at 88,300.

The F.R.B. has issued a letter directly on point. That entire opinion is as follows:

> You question whether it is necessary to show the "unpaid balance" pursuant to §226.8(c)(5) when there are no other charges to be disclosed pursuant to §226.8 (c)(4) and no prepaid finance charges or required deposit balances under ¶226.8(c)(6). In those circumstances the "amount financed" would be the same figure as the "unpaid balance of cash price", and the "unpaid balance", and the latter term could appropriately be omitted.
>
> F.R.B. Letter No. 536, September 23, 1971, [Transfer Binder Truth-in-Lending Special Releases-Correspondence, April, 1969 to April, 1974] CCH Consumer Credit Guide ¶30,748.[9]

Such interpretations by the F.R.B. of its own regulations must be given great deference by the Courts. *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974); *Bone* v. *Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974); *Taylor* v. *R.H. Macy & Co., Inc.*, 481 F.2d 178 (9th Cir.), *cert. denied*, 414 U.S. 1068 (1973); *Ivey* v. *Atlanta Gas Light Co.*, —— F. Supp. —— (N.D. Ga. 1974) CCH Consumer Credit Guide ¶98,704; *Evans* v. *Household Finance Corp.*, —— F. Supp. —— (S.D. Iowa 1973) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,007.

An analysis of the language of Conn. Reg. §36-395-7(c) (12 C.F.R. §226.8(c)) indicates the identical nature of "Unpaid Balance of Cash Price" and "Unpaid Balance" as applied to the two transactions at issue in this case. The "Unpaid Balance of Cash Price" is defined as the difference

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[9] The Connecticut Regulations provide that official rulings of the Federal Act by the F.R.B. are to be considered as official interpretations of the Connecticut Act. Conn. Reg. §36-395-11.

between the "Cash Price" and the "Downpayment," Conn. Reg. §§36-395-7(c)(1)-(3) (12 C.F.R. §§226.8(c)(1)-(3)). In this case, that figure is reflected on line 3 of both Disclosure Statements (App. pp. 17a, 18a). The "Unpaid Balance" is defined by the Regulations as the sum of the "Unpaid Balance of Cash Price" and "all other charges . . . which are included in the amount financed but which are not part of the finance charge." Conn. Reg. §§36-395-7(c)(3)-(5) (12 C.F.R. §§226.8(c)(3)-(5). The "amount financed," in turn, is defined as "the amount of credit of which the customer will have the actual use . . . ." Conn. Reg. §36-395-1 (4) (12 C.F.R. §226.2(d)). In these particular credit sales, the only "other charge" which could possibly be added to the "Unpaid Balance of Cash Price" is an insurance charge, i.e., charges itemized on lines 4 and 6 of the Statements (App. pp. 17a, 18a). However, it is clear from the face of the Statements that plaintiff in each instance here elected not to purchase insurance, as shown by the "slash" on lines 4 and 6 (App. pp. 17a, 18a). Thus, in the transactions involved in this case, the "Unpaid Balance," i.e., the sum of the "Unpaid Balance of the Cash Price" plus "other charges," must equal the "Unpaid Balance of the Cash Price", since there are no "other charges."

The reliance of the Court below on *Ives* v. *W. T. Grant Co.*, —— F. Supp. —— (D. Conn. 1974) CCH Consumer Credit Guide ¶98,847, *appeal pending,* (2nd Cir.) (Dkt. No. 74-2131) is misplaced. In that case, the customers each elected to obtain insurance and to include the premiums therefor in the "amount financed" on their contract. Therefore, in the contracts involved in *Ives,* the "Unpaid Balance" did *not* equal the "Unpaid Balance of the Cash Price", as it does here, and the failure to identify both figures consti-

tuted a violation of the Act.[10] *Compare, Ivey* v. *Atlanta Gas Light Co.,* —— F. Supp. —— (N.D. Ga. 1974) CCH Consumer Credit Guide ¶98,704, with *Welmaker* v. *W. T. Grant Co.,* 365 F. Supp. 531 (N.D. Ga. 1972).

In summary, since the "Unpaid Balance of the Cash Price" and the "Unpaid Balance" are identical, only the first term need be disclosed and the contrary ruling by the District Court was erroneous as a matter of law.

B. *The District Court Erred in Granting Summary Judgment on Plaintiff's Claim That the "Finance Charge" Is Not Disclosed in a Meaningful Manner*

The District Court, again solely by reference to *Ives,* held that defendant failed to disclose the finance charge in the clear, conspicuous and meaningful fashion required by Conn. Reg. §36-395-5(a) (12 C.F.R. §226.6(a)).[11] This decision, made upon a motion for summary judgment, was in error, both because there exists a genuine issue as to a fact material to the resolution thereof and because, assuming that there is no question of fact, defendant would be entitled to judgment thereon as a matter of law, Fed. R. Civ. P. 56(c).

To understand this claim, it is necessary to distinguish between the two types of contracts signed by customers for the purchase of merchandise. One group of customers does

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[10] In *Ives,* the defendant argued that, although there was a violation, there is no civil liability because of the "good faith" and "unintentional violation" defenses.

[11] Conn. Reg. §36-395-5(a) provides, in pertinent part:

> The disclosures required to be given by these regulations shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology prescribed in applicable sections.

not have any retail instalment contracts with defendant outstanding at the time they enter into a retail instalment contract for the purchase of merchandise. To such customers, defendant issues a contract, called a "new and reopened" contract, disclosing the cash price of the merchandise and a finance charge equal to the amount of the time-price differential thereon, plus any additional charges, which are disclosed as such. A second group of customers enters into a new retail instalment contract before the final instalment is due under an outstanding prior contract. As to these customers, a new contract, called an "add-on" contract, is issued. Such "add-on" contracts incorporate in the "Amount Financed" (1) the balance due on the outstanding contract, minus a rebate of the unearned finance charge on that balance, (2) the cash price of the new coupons and (3), where applicable, any additional charges, which are disclosed as such. The finance charge is then computed on the total of these items. Both of the contracts in this case are of the "add-on" type.

It is on "add-on" contracts that the District Court held that the "Finance Charge" was inadequately disclosed. Significantly, the Court in *Ives,* and, thus, below, did not dispute that the most important item, the cost of credit, is revealed on the "add-on" transaction; it found liability based only upon the format of that disclosure.

1. The Meaningfulness, Conspicuousness and Clarity of the Disclosure Presents a Genuine Issue of Fact

The propriety of disclosures as "meaningful, clear and conspicuous" presents a classic question of fact, which should not be resolved by summary judgment. As stated by the District Court for the Northern District of Illinois in *Peritz* v. *Liberty Loan Corp.,* —— F. Supp. —— (N.D.

Ill. 1973) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶98,969, *appeal pending* (7th Cir.) (Dkt. No. 74-1667):

> The remaining question is whether the notices concerning insurance are 'clear and conspicuous'. This is not entirely a question of law as the parties seem to assume. Although we are inclined to agree with the defendant's contention that its form in this respect complies with the legal requirements, this may be the reaction of a lawyer or judge and not of a reasonable or ordinary borrower. We believe the statute was enacted for the protection of the latter, not the former group. The Complaint therefor raises not only a question of law but also a question of fact. [1969-1973 Transfer Binder] CCH Consumer Credit Guide at p. 88,712.

The reasoning in *Peritz* is fully supported by the legislative history of the Act. Truth-in-Lending legislation was enacted to permit consumers to compare the "bottom line" in competing credit transactions—the amount which would be paid in finance costs under various methods of financing. 15 U.S.C. §1601. With this aim in mind, the clarity of a disclosure must be judged as a factual matter in terms of its impact on the consumer, not as a legal conclusion. Therefore, the District Court erred in granting summary judgment, since "no genuine issues of fact may be resolved on a motion for summary judgment." *Schum* v. *South Buffalo Railway Co.*, 496 F.2d 328, 331 n.4 (2d Cir. 1974). Significantly, in *Welmaker* v. *W.T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1972), upon which the District Court in *Ives* relied, the clarity issue was decided only after an evidentiary hearing, not on a motion for summary judgment.

The decision below should be reversed as to the question of the clarity of the finance charge disclosure and remanded for a hearing.

2. Even Viewed as a Matter of Law, the Disclosure of the "Finance Charge" Is "Meaningful Conspicuous, and Clear"

Even if this Court holds that the meaningfulness, clarity and conspicuousness of disclosure is a legal, rather than a factual, issue, it should still reverse the District Court on this question, since the disclosures are sufficiently clear to satisfy the requirements of Conn. Reg. §36-395-5(a); (12 C.F.R. §226.6(a)). The purpose of the Act and the Regulations promulgated thereunder is set forth in the Congressional findings in the Federal Act.

> The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of the subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. 15 U.S.C. §1601.

See also, Mourning v. *Family Publications Services, Inc.*, 411 U.S. 356 (1973). Judged against this standard, the "Finance Charge" disclosure is sufficiently conspicuous to comply with the Regulation, since "Finance Charge" is the only terminology in the right-hand column which is in bold-faced type. Thus, this "cost of credit" term is more likely to attract the consumer's eye than the accompanying disclosures. Furthermore, the "Finance Charge" is presented in a "meaningful sequence", since, as required by the F.R.B., the mathematical calculations are presented in the order in which they must be performed. F.R.B. Letter No. 780, April 10, 1974, CCH Consumer Credit Guide ¶31,102. The applicable portion of the disclosure statement reads as follows:

7. Amount financed (the sum of lines B,5,6(a) and 6(b)).

8(a) Finance Charge $

(b) Less rebate $ equals

9. Deferred payment price (the sum of lines B,1,4, 6(a), 6(b) and 8(a)).

10. Net add-on (the sum of lines 5,6(a), 6(b) and 8).

11. Total payments
(the sum of lines 7 and 8(a)).

The "Finance Charge" thus immediately follows the designation of the "Amount Financed", on which it is computed, and immediately precedes the "Deferred Payment Price" in which it is included. Furthermore, the required Truth-in-Lending disclosures of "Deferred Payment Price" and "Total Payments" relate back to the "Finance Charge" by reference to the line number on which the latter figure appears, thus facilitating even further the debtor's recomputation of the "Finance Charge". The additional information provided on lines 8(b) and 10, while not required by the Act or Regulations, further benefits the debtor by permitting him to differentiate between the portion of the contract which arises from the prior outstanding balance and the portion which arises from new purchases. Provision of such additional information is not a violation of the Act, because the careful line-numbering and typeface schemes adopted by defendant keep the required "Finance Charge" disclosure readily identifiable, F.R.B. Letter No. 780, April 10, 1974, CCH Consumer Credit Guide ¶31,102; Conn. Reg. §36-395-5(b); (12 C.F.R. §226.6(c)).

In summary, this Court should reverse the District Court and remand for further proceedings on the question of the clarity of the "Finance Charge".

C. *The "Finance Charge" Need Not Be Further Identified Where It Contains Only One Charge for Credit*

The Court below, by reference to *Ives,* held that defendant violated Conn. Reg. §36-395-7(c)(8)(A); (12 C.F.R. §226.8(c)(8)(i)) by not including "an itemized breakdown of finance charge components," as a part of the disclosure statement. That section provides:

> In the case of a credit sale . . . the following items *as applicable,* shall be disclosed:
>
> * * * * *
>
> The total amount of the finance charge with a description of each amount included, using the term "finance charge. . . . " (Emphasis Added).

"Applicable" provisions are "those necessary to rendering adequate consumer information and incident to a ready comparison of credit terms", *Kenney* v. *Landis Financial Group, Inc.,* —— F. Supp. —— (N.D. Iowa 1972) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,100.

On the record before the District Court, it is clear that the only element in the "Finance Charge" was an add-on time-price differential. Therefore, the requirement of "description" is not applicable and the use of the term "Finance Charge" is sufficient identification.

The F.R.B., which drafted the federal regulation, has interpreted it to exclude itemization where, as here, only an add-on charge for credit is included in the "Finance Charge". In a staff letter, the Board's adviser stated:

> It would be proper to simply disclose the dollar figure labeled as the "finance charge". The requirement of disclosure of "each amount included" is applicable only where the total amount of the finance charge includes more than one component. As you indicate, it would be preferable for the creditor not to obscure the clear impact of the disclosure of the "finance charge" by adding additional verbiage with regard to the fact that it is an "add-on". Such an addition could, in fact, violate §226.6(c) which prohibits adding information which is "stated, utilized, or placed so as to mislead or confuse the customer or contradict, obscure, or detract attention from the information required by this Part to be disclosed." Letter No. 682, April 25, 1973, [Transfer Binder Truth-in-Lending Special Releases—Correspondence April 1969 to April 1974] CCH Consumer Credit Guide ¶30,972.

This interpretation gains increased credibility, since the sample form in the F.R.B.-produced Handbook "What You Ought to Know About Truth-in-Lending" also refers only to a "finance charge", without itemization (Add. A., *infra*).

The Board's interpretation of the Regulations which it drafted should be given significant consideration by a Court which is also called upon to interpret an ambiguous provision.

> [T]he construction which the Federal Reserve Board gives its own Regulation Z in its Interpretations and staff opinions is especially entitled to grant deference 'because of the important interpretive and enforcement powers granted this agency by Congress' in this highly technical field.

Philbeck v. *Timmers Chevrolet, Inc.*, 499 F.2d 971, 977 (5th Cir. 1974) (relying upon an Interpretation and an

Opinion Letter); *accord, Bone* v. *Hibernia Bank,* 493 F.2d 135 (9th Cir. 1974) (relying upon an Interpretation, an Opinion Letter, and the Handbook); *Taylor* v. *R. H. Macy & Co., Inc.,* 481 F.2d 178 (9th Cir.), *cert. denied,* 414 U.S. 1068 (1973) (relying upon the Handbook); *Evans* v. *Household Finance Corp.,* —— F. Supp. —— (S.D. Iowa 1973) [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,007 (relying upon the Handbook).

Based upon the policy of the Act, the F.R.B. interpretation of §226.8(c)(8)(i) is sound. As stated by Undersecretary of the Treasury, Joseph Barr, before the House Committee, the legislation was aimed at providing a standard and simple set of terms to enable consumers to compare different sources of credit.

> The consumer now finds it impossible to select from all the credit sources available that one which is cheapest or best for his needs. Because of the wide array of lending practices he is unable to make a rational choice among the alternatives. There is abundant evidence on this point. This is an area in our economy that has grown so fast it has created its own language. Much of that language is beyond comprehension for most consumers. Even those sophisticated in finance find difficulty in distinguishing "add-on", "discounts", "precompute", "rule of 78's", "service charges", "finance charges", "interest", "term price differentials", "sales prices versus cash prices", and so forth. The variety of rate quotations is beyond belief and sometimes ridiculous. Even a financial expert, who knows the ins and outs of credit, can find the correct solution difficult in the absence of uniform standards for disclosure.
>
> Hearings on H.R. 11601 before Subcomm. on Consumer Affairs of House Comm. on Banking and Currency, 90th Cong., 1st Sess. 1967, p. 76.

The disclosure requirement imposed by the Court below contradicts that policy by requiring the labeling of the "finance charge" as "interest", "time price differential" or by some other name, thus leading the consumer to believe that there is some difference between the identical finance charges imposed by different sources of credit. For example, a retail store selling a refrigerator would be required to label its "finance charge" as a "time price differential", while a bank, from which the customer could borrow sufficient funds at a different annual percentage rate to buy the refrigerator for cash, would be required to label the "finance charge" as "interest". Thus, the customer might well be led to believe there was some difference, beside the cost of the credit, between the "finance charges" assessed by the two institutions.

This view has, since the date of the decision below, been adopted by the District of Connecticut, in an opinion by the same Magistrate who wrote the opinion in this case. In *Adams* v. *New Haven U. I. Federal Credit Union,* —— F. Supp. —— (D. Conn. 1975) (Dkt. No. 15,632), the Court, reversing its position in *Ives* and in this case, held:

> With defendant's finance charge containing only the single element of interest, the requirement of a "description of each amount included" in "the total amount of the finance charge", cf. 12 CFR §226.8(d)(3), is of questionable applicability since the regulation's language may be most naturally construed as addressed to the multiple-component finance charge. Moreover, the single-component "amount" is necessarily revealed by stating the finance charge amount, although whether clarity is better served by simple disclosure of the figure or by additional identification of its character is a matter for reasonable difference of opinion. While

> this Court has previously viewed "itemization" of the one-element finance charge as essential, see, e.g., *Ives* v. *W. T. Grant Co.*, Civil No. 15,125 (D. Conn. March 19, 1974), that position merits reconsideration in the light of Federal Reserve Board staff letters and materials subsequently brought to the Court's attention which indicate an inconsistent administrative interpretation entitled to traditional deference, cf., e.g., *Bone* v. *Hibernia Bank*, 493 F.2d 135, 139-140 (9th Cir. 1974).

A copy of the *Adams* opinion is attached hereto as Addendum B. Thus, *Ives* cited by the Court below as its sole authority, has been rejected by the very Court which initially ruled thereon. Defendant submits that this Court too should refuse to follow the faulty reasoning thereof. As to this issue, this Court should reverse the District Court and remand for further proceedings.

D. *The District Court Erred in Holding That Defendant Failed to Disclose Properly a Premium for Insurance*

The District Court, relying solely upon *Ives*, held that defendant failed to properly disclose insurance premiums for credit life and credit accident and health insurance, in violation of Conn. Reg. §§36-395-3(a)(5), 36-395-7(c)(8)(A); (12 C.F.R. §§226.4(a)(5), 226.8(c)(8)(i)).[12] Upon

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[12] Conn. Reg. §36-395-3(a)(5) provides:

> Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:
>
> * * * * *
>
> (5) charges or premiums for credit life, accident, health or loss of income insurance, written in connection with any

the record in this case, that decision was clearly erroneous, since no insurance was purchased on these contracts.

The contracts in this case clearly disclose that plaintiff did not purchase any insurance when entering into the December 1 and December 13, 1972 contracts (App. pp. 17a, 18a). Nor is there any statement in the plaintiff's affidavit that she purchased insurance when she entered into any earlier contract which may have been incorporated into these two "add-on" contracts. Thus, on the record before the District Court, there is no evidence whatsoever that there was any insurance premium ever charged to plaintiff and, therefore, no evidence which would place defendant under any duty to disclose an insurance premium. Phrased most simply, the District Court erred by holding that an insurance premium must be somehow disclosed, even where no such insurance premium exists.

The Court's reliance upon *Ives* is misplaced. There, the contracts showed on their faces that plaintiffs had purchased credit life and credit accident and health insurance. Furthermore, the affidavit submitted by plaintiff Mildred Ives in that case stated that she purchased such insurance.

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credit transaction unless (A) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and (B) any customer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance;

Conn. Reg. §36-395-7(c)(8)(A) provides:

(c) In the case of a credit sale, in addition to the items required to be disclosed under subsection (b) of this section, the following items, as applicable, shall be disclosed:

* * * * *

(8) except in the case of a sale of a dwelling: (A) The total amount of the finance charge, with a description of each amount included, using the term "finance charge". . . .

Finally, it was stipulated by the parties in *Ives* that there was no rebate of insurance premiums when customers entered into "add-on" contracts. Absolutely none of that evidence, which was crucial to the District Court's decision in *Ives,* is present in this record.

Therefore, as to the insurance issue in this case, this Court should reverse the entry of summary judgment and remand for a hearing on the question of whether plaintiff purchased any insurance.

E. *The Security Interest Retained by Defendant Is Adequately Disclosed*

The final disclosure error found in *Ives* and adopted by the District Court in this case as a violation is the alleged failure to adequately disclose the security interest retained by defendant in the goods purchased pursuant to the retail installment contract.[13] An examination of the disclosure statements in this case discloses that the security interest retained is clearly disclosed.

The form states, "the buyer agrees to make payments in accordance with the above schedule; and . . . (C) That the seller shall retain title to and have a purchase money in such merchandise except coupons until all amounts due

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[13] The applicable section of the Connecticut Regulation provides:

> (b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> * * * * *
>
> (5) a description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify.
>
> Conn. Reg. 36-395-7(b)(5)

hereunder shall have been paid, and the right, to possession in case of default. . . ." The only "merchandise" referred to anywhere in the contract is the specific merchandise purchased by the customer on that credit sale. The form states: "[T]he buyer . . . hereby buys from the seller and the seller sells the merchandise and/or merchandise coupon books *listed below*. . . ." (Emphasis added). There immediately follows the name of the item purchased—i.e. "1 5 pc. Danbury Set" on the December 13, 1972 contract and "1 52233 Gas Range" on the December 1, 1972 contract.

The standard for determining whether a security interest disclosure is sufficiently "clear" to conform to the requirements of the Regulation has been defined as follows: "[T]he goods must be identified so as to preclude any reasonable question regarding the goods to which the security interest attaches." *Kenney* v. *Landis Financial Group, Inc.*, 349 F. Supp. 939, 945 (N.D. Iowa, 1972). Thus, the FRB has held that the mere reference to "household goods", FRB Letter No. 521, August 26, 1971, [Transfer Binder, Special Releases-Correspondence April 1969 to April 1974] CCH Consumer Credit Guide ¶30,727, or "common stock", FRB Letter No. 509, July 30, 1971 [Transfer Binder, Special Releases-Correspondence, April 1969 to April 1974] CCH Consumer Credit Guide ¶30,712, is an adequate disclosure to conform to the Act. The disclosure here of the exact quantity and name of the item in which a security interest is retained far exceeds those requirements.

The District Court's reliance on *Ives* is again misplaced. The contracts involved in that case were for the purchase of coupon books, not actual merchandise items as are the contracts here. Therefore, the District Court in *Ives* concluded it was impossible to determine to what "merchandise" the security interest attached—the coupons or the merchandise for which the coupons were redeemed. Here

that problem does not exist, since the term "merchandise" in the security agreement can only refer to "the merchandise . . . listed below. . . ."

Therefore, since the decision below was erroneous as a matter of law, the summary judgment entered on this issue should be reversed and the case remanded.[14]

CONCLUSION

For the reasons stated in Section I, the decision below holding that subject matter jurisdiction exists under 15 U.S.C. §1640(e) should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction; in the alternative, for the reasons stated in Section II, the judgment of the District Court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Dated: May 16, 1975

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[14] Alternatively, this issue should be remanded for an evidentiary hearing on the factual question of whether the disclosure of the security interest is sufficiently "clear" to comply with the Regulations. See *Peritz* v. *Liberty Loan Co., supra;* pp. 21, 22, *supra.*

ADDENDUM

ADDENDUM A

What you ought to know about

FEDERAL RESERVE
REGULATION

Truth In Lending

Consumer Credit Cost Disclosure

THIS NEW FEDERAL LEGISLATION GOES INTO EFFECT JULY 1, 1969

EXHIBIT C

Seller's Name: _____ Contract #_____

_____

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT

The undersigned (herein called Purchaser, whether one or more) purchases from _____(seller) and grants to _____ a security interest in, subject to the terms and conditions hereof, the following described property.

QUANTITY	DESCRIPTION	AMOUNT	
Description of Trade-in:			
	Sales Tax		
	Total		

Insurance Agreement

The purchase of insurance coverage is voluntary and not required for credit. (Type of Ins.) insurance coverage is available at a cost of $_____ for the term of credit.

I desire insurance coverage

Signed_____ Date_____

I do not desire insurance coverage

Signed_____ Date_____

PURCHASER'S NAME_____

PURCHASER'S ADDRESS_____

CITY_____STATE_____ZIP_____

1. CASH PRICE $_____
2. LESS: CASH DOWN PAYMENT $_____
3. TRADE-IN _____
4. TOTAL DOWN PAYMENT _____ $_____
5. UNPAID BALANCE OF CASH PRICE $_____
6. OTHER CHARGES.
   _____ $_____
   _____ _____
7. AMOUNT FINANCED $_____
8. **FINANCE CHARGE** $_____
9. TOTAL OF PAYMENTS $_____
10. DEFERRED PAYMENT PRICE (1+6+8) $_____
11. **ANNUAL PERCENTAGE RATE** _____%

Purchaser hereby agrees to pay to_____ _____ at their offices shown above the "TOTAL OF PAYMENTS" shown above in _____ monthly installments of $_____(final payment to be $_____) the first installment being payable _____ 19_____, and all subsequent installments on the same day of each consecutive month until paid in full. The finance charge applies from (Date)

Signed_____

Notice to Buyer: You are entitled to a copy of the contract you sign. You have the right to pay in advance the unpaid balance of this contract and obtain a partial refund of the finance charge based on the "Actuarial Method." [Any other method of computation may be so identified, for example, "Rule of 78's," "Sum of the Digits," etc.]

This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (c) of §226.7 of Regulation Z for the type of credit extended in this example. This form is intended solely for purposes of demonstration and it is not the only format which will permit a creditor to comply with disclosure requirements of Regulation Z.

ADDENDUM B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 15,632

ALEXANDER ADAMS,

Plaintiff

vs.

NEW HAVEN U. I. FEDERAL CREDIT UNION,

Defendant

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The instant civil action arises from a loan made by the defendant federal credit union to one of its members in May of 1972; invoking this Court's jurisdiction under 15 U.S.C. § 1640(e) as to his primary federal claim, plaintiff challenges the adequacy of the underlying note document's compliance with federal and state truth in lending requirements, cf. 15 U.S.C. § 1601, *et seq.*, Conn. Gen. Stat. §36-393, *et seq.* The credit transaction was concededly subject to truth in lending regulation, no affirmative defense of clerical or good faith error has been interposed, cf. 15 U.S.C. § 1640(c), Public Law 93-495, § 406 (Oct. 28, 1974), and each party has moved for summary judgment on the merits.

The record of pleadings, discovery, affidavits and exhibits on file presents no genuine issue of fact material to determination of the dispute, cf. Rule 56(c), Fed. R. Civ.

P. The loan document, in separately signed parts labelled "promissory note under seal" and "record of transaction and loan disclosure", is a printed form with dates, amounts and signatures pertinent to the individual transaction supplied in writing. The first — or note — section signed by plaintiff evidences his obligation to pay the sum of $1,449.65 plus "interest on unpaid balances both before and after maturity at the rate of one per cent per month, payable in 36 installments of $48.10 including interest"; also above his signature to that portion of the document is the condition that "(u)pon default . . . any unpaid balance of the principal sum of this note together with accrued interest thereon . . . shall immediately become due and payable in full". In the following — or loan disclosure — section, the amount of $1,449.65 is shown as both the "net amount loaned" and the "amount financed", the sum of $282.60 is disclosed as the "finance charge (when loan paid on schedule)", the number and amount of monthly installment payments are again stated, an overall "total of payments" is computed and "annual percentage rate: 12%" identified. Read together, these provisions indicate that in all circumstances defendant imposes no more and no less than the maximum cost of credit permitted federal credit unions by statute, "interest not exceeding 1 per centum per month on unpaid balances, inclusive of all charges incident to making the loan", cf. 12 U.S.C. § 1757 (5), the precomputed $282.60 "finance charge" representing the interest element involved in repayment according to the contemplated timetable; defendant's uncontested extrinsic evidence confirms what the loan document at least implies, that there is no "unearned" portion of the finance charge exacted upon prepayment or as a penalty for delinquency or default.

Plaintiff contends that the document's terms are deficient in failing: (1) to describe each component of the finance charge, cf. 12 CFR § 226.8(d)(3), whether composed of but the single element of interest or also including an indirect insurance charge, cf. 12 CFR § 226.4(a)(5); (2) to identify "the method of computing any unearned portion of the finance charge in the event of prepayment", cf. 12 CFR § 226.8(b)(7); and (3) to furnish such disclosures "clearly, conspicuously, [and] in meaningful sequence", cf. 12 CFR § 226.6(a).

The overall "finance charge" is the "sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit", 12 CFR § 226.4(a), including such items as interest, cf. § 226.4(a)(1), and charges for involuntary insurance "written in connection with any credit transaction", cf. § 226.4(a)(5); if the finance charge encompasses more than one element, the loan creditor undoubtedly must disclose "the total amount of the finance charge, with description of each amount included, using the term 'finance charge' ", cf. 12 CFR § 226.8(d)(3). The 1972 loan in suit was covered by a blanket and ongoing policy for all member loans, with defendant apparently paying a monthly premium based on the total of outstanding loans. Plaintiff asserts that the interest on defendant's loans must to some extent reflect insurance cost, and defendant has not urged that premium expenses are paid exclusively from non-interest income. For 1972, defendant's income was comprised of $100,765.18 from loan interest, $8,377.57 earned on investments and $450.00 "other"; that income was spent for insurance, salaries, supplies, taxes and the like, with 578 loans having been made and loan protection insurance pre-

miums amounting to $5,237.81. In the circumstances presented, defendant need not break down its standard interest rate to attempt isolation of any conceivable insurance-related factor; insurance protection is seemingly an integral element of any federal credit union's operations, cf. 12 U.S.C. § 1781, there is no necessary or inherent correspondence between cost of insurance and defendant's uniform exaction of the maximum allowed rate of return on principal loaned, and plaintiff was not genuinely confronted with a hidden "extra" obscuring the true cost of credit in his particular transaction. Absent a showing of informed administrative interpretation to the contrary by the Federal Reserve Board, the Court is of the view that the regulations relied on by plaintiff are meant to require identification of a composite, overall cost of credit made up of interest *plus* other charges imposed in a particular transaction, not to compel this defendant's explicit analysis of any underlying cost of doing business as it deems prudent or finds necessary which may possibly bear on the rate of interest demanded. Indeed, disclosure of the bare facts of existence and cost of insurance generally would provide no more meaningful credit cost information than that already furnished, and an effort specifically to prorate insurance costs which may vary monthly is likely to yield inaccurate and misleading results.

With defendant's finance charge containing only the single element of interest, the requirement of a "description of each amount included" in "the total amount of the finance charge", cf. 12 CFR § 226.8(d)(3), is of questionable applicability since the regulation's language may be most naturally construed as addressed to the multiple-component finance charge. Moreover, the single-component "amount" is necessarily revealed by stating the finance charge amount,

although whether clarity is better served by simple disclosure of the figure or by additional identification of its character is a matter for reasonable difference of opinion. While this Court has previously viewed "itemization" of the one-element finance charge as essential, see, e.g., *Ives* v. *W. T. Grant Co.,* Civil No. 15,125 (D. Conn. March 19, 1974), that position merits reconsideration in the light of Federal Reserve Board staff letters and materials subsequently brought to the Court's attention which indicate an inconsistent administrative interpretation entitled to traditional deference, cf., e.g., *Bone* v. *Hibernia Bank,* 493 F.2d 135, 139-140 (9 Cir. 1974). Assessment of the significance and weight of such "unofficial" Board views is unnecessary in this case, however; prior concern that "(t)he term 'finance charge' is highly ambiguous and a borrower can hardly be expected to know whether it denotes one type of charge or . . . a whole host", *Johnson* v. *Associates Finance, Inc.,* 369 F. Supp. 1121, 1122 (S.D. Ill. 1974), is here fully met in any event because defendant's identification of the single finance charge component as interest is sufficiently "spelled out on the face" of the loan form, *Ives* v. *W. T. Grant Co., supra.* The Court agrees with counsel that defendant's compliance or non-compliance with the more general requirement of 12 CFR § 226.6(a) that disclosures "be made clearly, conspicuously, [and] in meaningful sequence" does not raise a triable fact issue, see, e.g., *Andrucci* v. *Gimbel Bros., Inc.,* 365 F. Supp. 1240, 1243-1244 (W.D. Pa. 1973), and resolves that issue in defendant's favor as a matter of law upon examination of the loan form.

The latter determination rests upon defendant's express references to interest in the context of a relatively simple and brief form which cannot realistically be said to leave a borrower uncertain of the finance charge's nature, even

though it would seem both feasible and useful to concentrate disclosure items more closely together, compare, cf., 12 CFR § 226.8(a). No such practical analysis of the document, however, can lead to a conclusion that defendant has provided adequate "(i)dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges", cf. 12 CFR § 226.8(b)(7).

If asserting that § 226.8(b)(7) is inapplicable when the creditor does not actually seek "unearned" interest on early payment of the debt, defendant is mistaken. By its terms, the regulation obviously comes into play whenever a precomputed finance charge is stated, mandating unequivocal notice of the credit cost consequences of prepayment. That defendant in fact adjusts its finance charge to require only "earned" interest on early debt retirement —and appears under a legal duty to do so, cf. 12 U.S.C. § 1757(5)—does not mean that the borrower may be left uncertain that prepayment would entail no proportionally greater credit cost. As a contrary rule would inform the borrower of the cost of credit only on the contingency of repayment on schedule, failure to disclose even a policy of full rebate could discourage early discharge of debt.

As indicated above, plaintiff was apprised by "loan disclosure" of a "finance charge (when loan paid on schedule)" of $282.60 added to the $1,449.65 amount loaned to yield a $1,732.25 "total of payments", with "installments of $48.10 each to be repaid in 36 monthly payments". The preceding "note" section sets forth a

> "promise to pay . . . the sum of One Thousand Four Hundred Forty Nine and 65/100 Dollars with interest on unpaid balances both before and after maturity at the rate of one per cent per month, payable in 36 in-

> stallments of $48.10 including interest, the first payment to be made on 5/30/72 and a like amount every month thereafter until the full amount has been paid".

For all that appears on the document's face, notations that $282.60 represents the "finance charge (when loan paid on schedule)" and that the borrower's obligation includes "interest on unpaid balances both before and after maturity at the rate of one per cent per month" might well be focused on consequences of delinquency. Implicit notice of defendant's prepayment policy and its method of implementation is not "identification" in conformity with 12 CFR § 226.8 (b)(7). If defendant has perhaps ambiguously "identified" a recognized "method of computing any unearned portion of the finance charge", cf. § 226.8(b)(7), or "method used in computing the rebate", *Bone* v. *Hibernia Bank, supra* at 138, the disclosure is neither made in a clear and conspicuous manner nor located in a meaningful position, cf. 12 CFR § 226.6(a).

Review of identical state law provisions leading to no different result, and plaintiff seeking but a single recovery of the liquidated damage remedy afforded by both statutory schemes, for the reasons set forth above plaintiff is entitled to judgment as a matter of law for $565.20, "twice the amount" of the $282.60 finance charge, together with costs and "a reasonable attorney's fee as determined by the court", cf. 15 U.S.C. § 1640(a). Plaintiff's motion for summary judgment is hereby granted and defendant's cross-motion hereby denied; upon prompt application for and the undersigned United States District Judge's determination of the appropriate attorney's fee, judgment shall enter accordingly, cf. *Williams* v. *American Tractor Trailer Training, Inc.*, Civil No. 14,117 (D. Conn. 1974).

Because of the potentially dispositive nature of the parties' cross-motions for summary judgment, at the conclusion of oral argument on the merits the undersigned United States Magistrate inquired as to the intended significance of the complaint's allegations that "(p)laintiff brings this action on behalf of himself and all others similarly situated . . . . those who have signed a note payable to the order of Defendant", with class action status not having been discussed or pursued, cf. *Carracter* v. *Morgan,* 491 F.2d 458 (4 Cir. 1973). Following subsequent chambers conference and ensuing correspondence, plaintiff ultimately requested class certification under Rule 23(b)(2), Fed. R. Civ. P., and injunctive relief — both resisted by defendant. Assuming that the requirements of Rule 23(a) and (b)(2) are otherwise satisfied by the record presented, plaintiff's prior inaction questionably demonstrates conduct of a representative party "fairly and adequately protect[ing] the interests of the class", cf. Rule 23(a)(4), Fed. R. Civ. P., and the long-dormant interest in any class relief is certainly inconsistent with the procedural direction that certification be resolved "[a]s soon as practicable after the commencement of an action", cf. Rule 23(c)(1), Fed. R. Civ. P. Although this belated request might not have involved material additional delay, compare *Adise* v. *Mather,* 56 F.R.D. 492, 494-495 (D. Colo. 1972), such eleventh-hour practice should not be condoned. Moreover, plaintiff's after-thoughts serve no substantial purpose. Since a declaratory judgment has not been sought, converting the suit into a class action at this stage is but a device to give full scope to plaintiff's equally last-minute application for an injunction. The latter is without merit; in response to the representation that if defendant "agrees appropriately to correct its note disclosures within a reasonable time after judgment,

Plaintiff would be willing to withdraw his claim for injunctive relief", defendant explicitly did agree that

> "if and when a judgment of this Court in favor of the plaintiff is affirmed by a court having final jurisdiction, it will, within a reasonable time after such affirmation, correct its note to comply with the law, as interpreted by the Court".

Plaintiff's subsequently refined suggestion that injunctive relief "be stayed for thirty days from the date of any judgment rendered in favor of Plaintiff" rather than simply refused has little to commend it since the Court is persuaded that such relief is unnecessary, cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953), compare *Ives* v. *W. T. Grant Co., supra.* The requests for class certification and an injunction incident to plaintiff's motion for summary judgment are hereby denied.

Dated at New Haven, Connecticut, this 14th day of March 1975.

ARTHUR H. LATIMER
United States Magistrate

SO ORDERED

ROBERT C. ZAMPANO
United States District Judge